Office-Supreme Court, U.S.
FILED
APR 27 1981
ALEXANDER L. STEVAS,

No. 80-1577

IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

CITY OF MESQUITE

Appellant.

v.

ALADDIN'S CASTLE, INC.

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Reply Argument 1

a. Scope of Questions Presented 1

b. Reasons for Plenary Review 2

Certificate of Service 5

TABLE OF AUTHORITIES

Cases

Page

Murphy v. California, 225 U.S. 723 (1912) 3,4

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REPLY ARGUMENT

a. Scope of Questions Presented

The first primary issue presented involves the constitutional limitations, if any, upon the power of a municipality to regulate by ordinance the operation by children of coin-operated commercial amusement machines. The Court of Appeals herein apparently found that the Fourteenth Amendment, by its due process and equal protection clauses, precluded a legislative regulation requiring the

owner of such an amusement parlor to restrict actual operation of such machines to persons at least seventeen years of age or younger children whose parents or guardians are present. Admittedly, the lower Court invoked various techniques or standards of analysis (purporting to apply both the "rational relation" test and the "strict scrutiny" standard) and determined, apparently, that the right of children under seventeen to play commercial coin-operated amusement machines without a parent or guardian present is a fundamental constitutional right.

The first question presented in the Jurisdictional Statement contests in all respects the holding of the Court of Appeals that the Constitution prohibits the challenged legislative conditions and qualifications upon children's operation of commercial coin-operated amusement devices. Relying upon this Court's Rule 15.1(a), Appellant has assumed that the subsidiary questions, concerning the selection of a proper standard for judicial review of the challenged legislation and the application of that standard, are fairly included and will be considered by the Court.

Appellant does not, in any way, concede or agree that its ordinance is arbitrary or irrational or otherwise in violation of the Fourteenth Amendment. All the issues of the constitutionality of the legislative qualifications on any rights of children to play coin-operated amusement machines are clearly raised by the Jurisdictional Statement.

b. Reasons For Plenary Review

To oppose this Court's full consideration of the case, on briefs and arguments, the Appellee next suggests that the appeal seeks a definition of "the totality of the relationship of the juvenile and the state." That is a patently erroneous statement of the purpose of the appeal. The purpose simply is to obtain a decision as to the constitutional limitation (if

any) upon a municipality's power to regulate the playing of commercial coin-operated amusement devices by children unaccompanied by their parents or guardians. The totality of the legal relationships between children and the state is not at issue.

Finally, in opposing plenary review, the Appellee argues that the opinion below is correct and presents no novel constitutional question. However, the lower Court opinion itself recognizes that this Court has never considered whether any constitutional right of association "in a social context" exists or whether it extends to prevent legislative regulation of children's operation of coin-operated commercial amusement devices. 630 F.2d at 1041.

Further, in reaching its decision the Court of Appeals in effect overruled this Court's long-standing opinion on the power of a state to regulate such commercial amusement parlors, *Murphy v. California*, 225 U.S. 723 (1912). In *Murphy*, this Court upheld the state's power to regulate or even prohibit such non-useful commercial enterprises and said,

> That the keeping of a billiard hall has a harmful tendency is a fact requiring no proof, and incapable of being controverted by the testimony of the plaintiff that his business was lawfully conducted, free from gaming or anything which could affect the morality of the community or of his patrons. The fact that there had been no disorder or open violation of the law does not prevent the municipal authorities from taking legislative notice of the idleness and other evils which result from the maintenance of a resort where it is a business of one to stimulate others to play beyond what is proper for legitimate recreation.

225 U.S. at 629. How much more do those evils affect children? How "irrational" was it for the City of Mesquite to

protect its health and welfare through legislating as it did to protect children against those perceived evils?

The Court of Appeals herein held that this Court's opinion in *Murphy* is no longer good law, even when children are involved. It apparently held further that a legislative body can make no *moral* judgment as to standards of decency or as to the effect of a particular enterprise or activity on the welfare of the community or even on its children. 630 F.2d at 1040, 1041, n.16.

If the lower court is correct in its holding that the ordinance's prohibition of play by unaccompanied children is unconstitutional for any reason — either that it is "irrational" or that it violates a fundamental constitutional right of children to associate wherever and with whomever they please — then it would follow that other legislative regulation or prohibition of businesses, based upon any legislative considerations of decency or morality or the special vulnerability of children to morally corrupting influences, are unconstitutional.

Appellee's Motion to Affirm does not diminish or even debate the substantiality of the issues presented. The technical arguments therein raised should not deter this Court from fully considering the issues presented, through briefs and oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 25th day of April, 1981, three copies of the Brief in Opposition to Appellee's Motion to Affirm of the City of Mesquite for an appeal from the United States Court of Appeals for the Fifth Circuit have been served by depositing the same in the United States mail, postage prepaid and addressed as follows:

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All parties required to be served have been served.

/s/ JAMES A. ELLIS, JR.

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